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The foundations of legal citizenship: Community law, access to, justice and the community legal sector

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Abstract

The conventional role of community legal centres (CLCs) is as specialists in community law. As specialists in community law, CLCs play a vital role in giving practical meaning to the notion of legal citizenship and to the concept of the citizen within the communities they serve. CLCs should also be seen as having a broader role beyond community law, one that encompasses legal citizenship. This concept of a broader role for CLCs is alien to the way most government funding authorities, CLC clients and many CLCs view themselves. However, viewing CLCs in terms of legal citizenship provides an opportunity to focus on how CLCs assist citizens to defend and extend their rights in the areas of civil, administrative and family law.

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THE FOUNDATIONS OF LEGAL CITIZENSHIP

Community law, access to justice
and the community legal sector

MARK RIX and SCOTT BURROWS

The conventional role of community legal centres (CLCs) is as specialists in community law. As specialists in community law, CLCs play a vital role in giving practical meaning to the notion of legal citizenship and to the concept of the citizen within the communities they serve. CLCs should also be seen as having a broader role beyond community law, one that encompasses legal citizenship. This concept of a broader role for CLCs is alien to the way most government funding authorities, CLC clients and many CLCs view themselves. However, viewing CLCs in terms of legal citizenship provides an opportunity to focus on how CLCs assist citizens to defend and extend their rights in the areas of civil, administrative and family law.

Civil law incorporates matters including housing and tenancy, employment law, credit and debt, consumer law, neighbourhood disputes and motor vehicles. Administrative law, a sub-category of civil law, involves such matters as social security and immigration. Family law includes such matters as divorce, property and contact and residency of dependent children. It is these sorts of matters that account for most people's direct interactions with the legal system. In the first instance, these issues are usually dealt with across service counters or in informal counselling and conciliation sessions rather than in court hearings. As providers of professional legal advice, CLCs also inform citizens of their basic rights and assist them to exercise these rights when dealing with government agencies, business and other citizens.

The community law services provided by CLCs are often mundane, unglamorous and routine. Nevertheless, the matters encompassed in community law affect the cohesiveness and inclusiveness of the bonds that tie people together as members of the community and as citizens of Australia. These bonds are based on the rights that individuals have in common as citizens and human beings, their knowledge of those rights and their ability to exercise them effectively, and their respect for others as holders of the same rights. Thus, CLCs play an important role in contributing to the cohesiveness of Australian society and the inclusiveness of its democratic institutions. Legal citizenship too, is significant because it calls attention to the importance of the cohesiveness and inclusiveness of Australian society, of all citizens' equality before the law and access to justice. Equality before the law and equal access to justice underpin the legitimacy and effectiveness of the entire legal system.¹

This article begins with a discussion of a government's obligation to ensure equal access to justice and equality before the law for all its citizens and of the importance of legal citizenship. The second section profiles the community legal sector with a focus on CLCs as experts in community law and legal citizenship. The third and final section examines the community legal sector's role in giving effect to legal citizenship for poor and disadvantaged Australians and considers the implications for the sector and Australian society as a whole if it is no longer able to do so.

Legal citizenship, community law and the role of government

In its submission to the recent Senate Inquiry into Legal Aid and Access to Justice, the National Association of Community Legal Centres (NACLC) lamented that, while public debate was largely preoccupied with the crisis in the public health and education systems, '[t]he crisis in the justice sector goes largely unnoticed'.² Whilst grossly inadequate funding has certainly contributed to the justice crisis, it is not the only cause. It was also 'created by the failure of governments to understand the intrinsic importance of an effective system of justice in a democratic society and so to appropriately prioritise matters of justice'.³ Even more to the point, NACLC asserted that: 'The justice system in Australia is a system of injustice caused by the allocation of insufficient resources and the consequent denial of access to justice on a daily basis'.⁴

Lacey argues that while civil society institutions such as schools, families, clubs and so on cannot be regarded as criminal justice institutions as such, nevertheless they are 'highly relevant to the potential effectiveness of criminal justice institutions strictly so-called'.⁵ These institutions can make an important contribution to 'social ordering' in such a way as to reduce reliance on the 'hard end' of the criminal justice system. However, in situations of 'social fragmentation', brought about by poor housing and education, high unemployment and entrenched poverty, the capacity of civil society institutions to contribute to social ordering and stability is limited. These and other social problems are the underlying causes of much crime. They are often the result of, or are exacerbated by, failures of public policy. The crisis in the public health and education systems are but two instances of such failures. Access to justice and equality before the law, both intrinsic to the notion of legal citizenship, are

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3. Ibid.
4. Ibid 4.
5. Nicola Lacey, 'Social Policy, Civil Society and the Institutions of Criminal Justice' (2001) 26 *Australian Journal of Legal Philosophy* 7.

CLCs play an important role in contributing to the cohesiveness of Australian society and the inclusiveness of its democratic institutions.

also important in the maintenance of social order and prevention of social fragmentation.

In its 2003 discussion paper, *Doing Justice: Acting Together to Make a Difference*, NACLC had earlier pointed out that the federal, State and Territory governments had, over an extended period, all failed to acknowledge the importance of legal citizenship in modern societies like Australia. Legal citizenship essentially refers to the right of all citizens to have 'fair and effective access to the justice system'.⁶ It requires governments to put in place such policies and programmes as would enable all citizens to give effect to this right. Legal citizenship is fundamental to the maintenance of social order and stability, and to the prevention of social fragmentation. The idea that 'each citizen is equal before the law and should have access to justice is essential to the community's confidence and compliance with the law'.⁷ Such confidence in and compliance with the law are absolutely essential because the law is what establishes 'the shape of society and its character'.⁸

In similar fashion, the report of the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice observed that a 'civilized society' owes an obligation to provide its citizens with access to justice, but most 'particularly to those who are already disadvantaged'.⁹ This observation highlights the need to return to the cooperative model of legal aid funding that was in place prior to the introduction of the purchaser/provider funding model in 1997. The cooperative model gave each State and Territory Legal Aid Commission (LAC), or its equivalent, responsibility for setting budget priorities and corresponding levels of funding. Representation on LAC boards enabled the Commonwealth Attorney General's Department to participate in these decisions. However, with the introduction of the purchaser/provider model 'state and territory LACs have been restricted to allocating Commonwealth funding to matters arising under Commonwealth laws' with the Commonwealth setting the 'priorities, guidelines and accountability requirements' for the use of the funds it provides.¹⁰ Besides restricting access to justice for many citizens, the Commonwealth's refusal to accept any responsibility for funding matters that fall under State and Territory laws has led to increased administrative costs and bureaucratic difficulties in matters that do not respect jurisdictional boundaries. These

additional costs and administrative difficulties further restrict access to justice.

On a broader front, the Senate report noted that the Inquiry had been provided with evidence suggesting 'that various groups are particularly restricted in gaining access to justice, due to such factors as socio-economic disadvantage, cultural background and remoteness from mainstream legal services'.¹¹ The key groups whose access to justice is limited by the current legal aid arrangements are women (especially in family law matters), indigenous Australians, people living in regional, rural and remote areas, and migrants and refugees. Other groups whose access to justice has been adversely affected by these arrangements are homeless people, the mentally ill and young people.

The Senate report points out that there is evidence to suggest that reduced legal aid funding has led to a significant increase in the numbers of people appearing before the courts without adequate legal advice or representation. This is a situation that 'has a potentially serious consequence for the enforcement of individual rights'.¹² This view was endorsed in the Law Institute Victoria's submission to the Senate Inquiry, which observed that:

The current [legal aid] arrangements are unfair and do not make the justice system accessible. On the contrary the perception is that legal aid is broadly unavailable and most people are not able to instruct lawyers to represent them throughout the litigation process. The result is that many people abandon their legal rights and others will be forced to pursue them as litigants in person. Neither of these results is satisfactory.¹³

As for pro bono legal services, the Senate report cautions that these 'should not be seen as a substitute for adequate legal aid funding'.¹⁴ It also notes that '[t]here are still areas where private law firms provide very limited assistance, particularly in some of the low profile areas of the law such as community law'.¹⁵

Community law may be 'low profile', but it is of vital importance in many people's daily lives. Larger law firms frequently lack expertise in the matters included in community law, but these are often where demand for legal services is greatest. This includes matters such as 'immigration, family law, matters against lawyers or doctors, and matters against banks and insurance companies'.¹⁶ Also included under the rubric of community law are tenancy, credit and debt, and social security law. Thus, important parts of this 'low profile' area are matters often requiring citizens to be represented against government or its agencies. All of

6. National Association of Community Legal Centres (NACLC), 'Doing Justice: Acting together to make a difference' (2003a) 7.

7. Federation of Community Legal Centres (Vic) Inc, 'Submission to the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice' (22 September 2003) 8.

8. NACLC, 'Doing Justice: Acting together to make a difference', above n 6, 6.

9. Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (June 2004) xv.

10. *Ibid* 3.

11. *Ibid* xvi.

12. *Ibid* xc.

13. *Ibid*, cited at 181 (emphasis added).

14. *Ibid* xix.

15. *Ibid*.

the matters included in community law, the province of the community legal sector, require high levels of expertise and specialisation.

The community legal sector and legal citizenship: constraints and possibilities

The community legal sector comprises more than 200 CLCs across Australia, about 130 of which are funded under the Commonwealth Community Legal Services Program (CCLSP) to provide legal services to 'disadvantaged' members of the community. Over the last eight years, 'these 129 centres have provided services to more than 1.5 million people throughout Australia in urban, regional and remote areas, and provided over 2.5 million instances of legal advice, information and case assistance'.¹⁷ In addition to their community legal education, law reform and policy activities, these centres tallied an impressive 450 000 individual service interactions which included provision of legal advice and information and opening of new cases.

Individual CLCs fall into one of three broad categories: generalist, specialist and hybrid centres. Generalist centres service a particular region or a geographically defined community. Centres falling into the specialist category provide services to a particular section of the wider community (women, young people, migrants, people with a disability) or in a particular area of the law (tenancy, environmental, consumer credit). Hybrid centres are generalist centres but include a specialist service such as a children's legal service.

As noted by the Senate report, although the 'community legal centre sector is a crucial part of providing access to justice for all Australians'¹⁸ it should not be regarded as an alternative to legal aid. The legal and related services delivered by the community legal sector complement the services provided by LACs and the private legal profession. Not only are these services complementary they are also different, addressing 'legal needs that might otherwise remain unfulfilled'.¹⁹ It has already been noted that such legal needs arise in areas of the law that are unable to be dealt with by LACs or in which the private legal profession lacks expertise.

According to the 'Service Agreement' between the Commonwealth government and the community legal sector — more correctly, each of the CLCs in the CCLSP — the Program is 'an integral component of the Commonwealth's social justice strategy'.²⁰ The Commonwealth funds CLCs in the Program to

provide 'equitable access' to legal assistance, advice and related services for disadvantaged members of the community and those having 'special needs'. For the Commonwealth, the community legal sector is a 'key component' of the legal aid system that provides services complementing those provided by LACs and the private legal profession.²¹ Unfortunately, the severe funding constraints imposed on legal aid (through, for example, funding 'caps' and exclusionary means and merits tests) and on the community legal sector suggests that social justice and equitable access to legal services are not very high priorities at all for the Commonwealth government. Citing the NACLC's submission to the Senate Inquiry, for example, the Senate report noted that the '10.25% cumulative shortfall in the already low base line staffing budgets of CLCs in the period 1997 to 2002' has had a drastic impact on the capacity of centres to undertake their core activities.²² This is a significant problem because there is an unrealistic expectation that the community legal sector will be able to come to the rescue and fill the breach in the legal aid system. As noted in the Senate report: 'It is imperative that the Commonwealth and State/Territory governments acknowledge existing shortfalls in funding and accept that a continuing deterioration in circumstances will inevitably lead to a severe crisis for CLCs'.²³ This crisis, which the Senate report makes clear is already a stark reality, can only have serious social consequences given the important role that the community legal sector plays in 'providing access to justice for all Australians'.²⁴

Beyond the funding shortfalls that have led to large areas of unmet legal need and a failure to provide equal access to justice, the model under which CLCs are funded and administered by the Commonwealth also has grave implications for the meaning and significance of legal citizenship. As with legal aid, the model is of a purchaser/provider type, the Service Agreement being a fundamental element of this funding arrangement. In reality, the Agreement is little more than a performance contract establishing a strict principal-agent relationship between the Commonwealth and the community legal sector. Under the Service Agreement, the Commonwealth 'operates' the CCLSP, and retains responsibility for determining CCLSP priorities, monitoring the Program's performance, and ensuring the accountability of the Program for Commonwealth funding.

The Agreement also includes a measure of supervised self-regulation in that it acknowledges the detailed

16. Ibid 172.

17. NACLC, 'Doing Justice: Acting together to make a difference', above n 6, 11.

18. Senate Legal and Constitutional References Committee, above n 9, xix.

19. Ibid 208.

20. The 'Service Agreement' is a national template document tailored to some extent to the funding and other specified needs of each CLC. Only slight variations are allowed. The current Service Agreement has expired and is currently being re-negotiated. It is available at <www.ag.gov.au/agd/WWW/cclsp/home.nsf/> at 3 June 2005.

21. Attorney General's Department 2004, 'Commonwealth Community Legal Service Program Guidelines' 5. The Guidelines document available on the Department's website is dated June 1998 <www.ag.gov.au/agd/WWW/cclsp/home.nsf/> at 3 June 2005.

22. Senate Legal and Constitutional References Committee, above n 9, 212. For a variety of reasons, CLCs' staffing budgets account for a higher proportion of overall operating costs than is the case for private legal practices and legal aid authorities.

23. Ibid 217.

... there is an unrealistic expectation that the community legal sector will be able to come to the rescue and fill the breach in the legal aid system.

knowledge that a centre has of the community it serves. This knowledge underpins the capacity of a centre to play a role in reducing the legal needs of that community, to identify unmet areas of legal need, and to successfully administer the services it provides. Under the Agreement, a CLC agrees 'to provide quality Services ... for the disadvantaged' and 'to maintain compliance with Service Standards, and to ensure that its operational procedures reflect the attributes set out in them'.²⁵ The Service Standards cover all of the core service activities undertaken by CLCs (legal information, advice and casework, community legal education, and policy and law reform). The Agreement also sets Service Standards for accessibility, organisational management, information and data management, and client satisfaction and complaints management. CLCs are required to submit an annual Service Standards audit, a written report of a centre's own assessment of its level of compliance with the Service Standards. Thus, centres monitor and assess their own performance in accordance with the Service Standards contained in the Service Agreement. The Agreement specifies the terms of the contract between the Commonwealth and a CLC, the former purchasing the services provided to clients by the latter on the government's behalf. The purchaser/provider funding and regulatory model, enshrined in the Service Agreement, is part of a much larger shift in the role of the States and the Territories, and the governments that manage them, and their relationship with the citizens they govern.

The state as service provider, the citizen as client

Through outsourcing, purchaser/provider funding arrangements and the use of market-emulating mechanisms in service delivery, the state has been transformed. It is now essentially a service provider — even if it is not directly involved in service delivery — and supervisory regulator of the private and community sector organisations it has contracted as agencies to provide services on its behalf. Notions of efficiency and cost-effectiveness, choice and individual preference take the place of equality, fairness and standardisation, and managerial accountability is preferred to political accountability.

In line with the emergence of this new state, a new mode of citizenship has developed. In reviewing these developments, Rix points out:

The contracting out of public services does not simply mark a change in the way that governments deliver services to citizens, as important as this is. In drastically transforming the relationship between government and citizens, contracting out has also brought about the emergence of a new mode of citizenship. As the NPM [New Public Management] or contract state has divested itself of many of the roles and functions that were once regarded as core responsibilities of the welfare state, so has 'citizenship' been similarly hollowed out. In other words, citizenship has come to denote a much narrower range of far more limited citizen rights than the term denoted during the era of the welfare state. The term 'consumer citizenship' refers to this narrowing and hollowing out of the meaning and significance of citizenship.²⁶

Consumer citizenship encourages individuals to display activism, individualism and self-mobilisation in their consumption of public services, and claims to offer them diversity and choice in services and service delivery. Citizens are compelled to pay for or 'earn' the benefits and services supplied by private or community sector organisations contracted to government, and in attempting to seek redress for any shortcomings or problems in service delivery they essentially play the role of active and responsible consumers.²⁷ In this way, citizens have been recast as consumers and in assuming this role have been required to shed many of the rights that they once enjoyed as citizens acquiring in their place the limited rights of the 'sovereign consumer'.

The information, assistance and advice provided by CLCs enable their clients to behave as active and responsible consumers of products and services supplied by organisations drawn from the private, community or public sectors. There is no doubt that the role of CLCs in informing individuals of their rights as consumers is an extremely important one, for privatisation, outsourcing and so on have meant that individuals now face an array of providers of even the most basic services

24. Ibid. xx.

25. Service Agreement, above n 20.

26. Mark Rix, above n 1, 5.

27. Mark Rix, 'Divided Loyalties? The New Public Management of Community Legal Centres', *Third Sector Review* (2005, in press).



28. NALCLC, 'Submission to the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice', above n 2, 4.

29. Some of this terminology is borrowed from Margaret Allars, 'Citizenship Rights, Review Rights and Contractualism' in Terry Carney, Gaby Ramia, Anna Yeatman (eds), *Contractualism and Citizenship*, special edition of *Law in Context* (2001) 18(2) 79–111; see also TH Marshall, *Class, Citizenship and Social Development*, (1st ed, 1963).

and utilities sometimes involving the exercise of individual choice or preference. Each provider has its own set of community service obligations, product disclosure statements, grievance and dispute resolution mechanisms and the like. The assistance provided by CLCs is often necessary to enable individuals to negotiate these hurdles and obstacles successfully. Notwithstanding its importance, this role pales into insignificance against that of giving effect to legal citizenship.

Legal citizenship refers to the equality of all citizens before the law and their right to equal, fair and effective access to justice. Equal access to justice and equality before the law are fundamental elements of a just and civilised society, and are essential in preventing social fragmentation and disorder. In striving to give effect to the principles underlying and informing legal citizenship, CLCs play an important role in maintaining social order and preventing social fragmentation. The advice and assistance provided to clients on how to be better, more active and responsible consumers of public services is also important in the maintenance of social order in circumstances of crisis and neglect in the public health, education and social welfare systems. Social fragmentation and disintegration of the social order is already happening. The deepening crisis in the community legal sector, further undermining legal citizenship, will continue to threaten even greater fragmentation and disorder.

The justice system has become more complex and difficult to negotiate with a massive proliferation of laws encroaching on citizens' everyday lives. The NALCLC estimates that, since the 1970s, there has been a doubling of legislation affecting the daily lives of citizens without any corresponding increase in resourcing and funding for legal advice, representation and community education. The NALCLC has observed that: 'Ordinary citizens are now expected to understand, interpret and negotiate the legal landscape alone in a climate of increasing complexity and reduced government commitment to civil society'.²⁸

The expansion in numbers of laws, and the associated complexities and difficulties, presents considerable challenges for the community legal sector in playing a constructive role in maintaining the legitimacy of the legal system. This is particularly so for those individuals making up the majority of centres' client base who, through poverty and other forms of disadvantage, are already largely excluded from mainstream society in the sense of not being able to participate in key economic

and social activities. It is these people who face the greatest obstacles in gaining access to justice and for whom 'equality before the law' is therefore often little more than empty rhetoric.

Legal citizenship is not just about equal access to justice and equality before the law. Just as importantly, it is about providing individuals with the means and opportunity to be full and active members of society. Full membership of society entails active participation in the public sphere. That is, it encompasses a citizen's ability to exercise their political rights. Legal citizenship is indispensable for the full integration of all citizens into society, fostering a sense of community, belonging and participation.²⁹ It encourages individuals to give effect to their political rights and individual freedoms. By providing poor and disadvantaged Australians with the means to enjoy their legal citizenship, the community legal sector plays a significant role in preventing social disintegration and disorder, and in underwriting the legitimacy of the legal and political systems. The growing crisis confronting the sector threatens the cohesiveness and inclusiveness of Australian society.

Conclusion

Equal access to justice and equality before the law, the twin constituents of legal citizenship, are basic principles underpinning a just and fair society. Upholding these principles preserves the legitimacy and effectiveness of the legal system. It is also essential for the full integration of all citizens into society, validating their active participation in the public sphere and in the political life of the country. The community legal sector plays an extremely important role in enhancing the inclusiveness of Australian society by assisting poor and disadvantaged citizens in gaining access to justice and protecting their equality before the law. This it does against considerable and worsening odds. Unless these odds significantly improve, the sector and the society it serves are both headed for difficult and hazardous times.

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